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Elk Valley Rancheria, California

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

ELK VALLEY RANCHERIA, CALIFORNIA	)	CASE NO. 2:09-CV-00621-KJD-GWF
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
ELLIS PARTNERS, INC., a Delaware corporation;	)	<b>PLAINTIFF, ELK VALLEY</b>
ELLIS PARTNERS, LLC, a Nevada limited liability	)	<b>RANCHERIA, CALIFORNIA'S</b>
company; ELLIS GAMING & ENTERTAINMENT,	)	<b>MOTION FOR PARTIAL</b>
LLC, a Nevada limited liability company; and R.	)	<b>SUMMARY JUDGMENT</b>
Shawn Ellis, an individual	)	
	)	<b>(Oral Argument Requested)</b>
Defendants.	)	
	)	
And All Related Claims and Third-Party Actions	)	
	)	

Plaintiff, ELK VALLEY RANCHERIA, CALIFORNIA ("Elk Valley"), by and through its counsel of record, Gordon & Rees LLP, pursuant to Federal Rules of Civil Procedure, Rule 56, hereby moves this Court for an Order granting partial summary judgment on Elk Valley's first cause of action for breach of contract, and second cause of action for breach of guaranty agreement.

This motion is based upon the pleadings and papers on file herein, the Points and Authorities attached hereto, including Declaration of Joseph P. Hardy ("Hardy Dec."), Declaration of Dale Miller ("Miller Dec."), and the exhibits in support of this Motion for Summary Judgment.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This dispute arises out of a series of loans made by Plaintiff Elk Valley to Defendant Ellis  
4 Partners, LLC. The repayment of the indebtedness was guaranteed unconditionally by  
5 Defendant, R. Shawn Ellis, individually, pursuant to a Guaranty Agreement contained in each of  
6 the loan agreements ("Promissory Notes")<sup>1</sup>. The Promissory Notes have matured.<sup>2</sup> Elk Valley,  
7 having performed its part of the terms and provisions of the Promissory Notes, demanded  
8 payment from Ellis Partners, LLC, including the principal sum plus accrued interest in the  
9 amount of \$551,173.77, as well as continuing interest. It is undisputed that Defendants have not  
10 paid these sums to Elk Valley.

11 Elk Valley initiated this action in the District Court for Clark County, Nevada, on  
12 October 28, 2008, seeking recovery of payments owed by Defendants under the Promissory  
13 Notes, and for various claims related to Defendants' conduct inducing Elk Valley's loan to  
14 Defendants. [Hardy Dec., Ex. 1 (Complaint)].

15 On December 22, 2008, Defendants, Ellis Partners, Inc.; Ellis Partners, LLC; Ellis  
16 Gaming & Entertainment, LLC ("Ellis Gaming"); and R. Shawn Ellis ("Ellis") (hereinafter  
17 collectively referred to as "Ellis Defendants"), filed an Amended Answer that included a  
18 Counterclaim against Elk Valley, and a Third-Party Complaint for various torts against Third-  
19 Party Defendants, Gerry Nailon and Kathleen M. Innaurato. [Hardy Dec., Ex. 2 (Defendants'  
20 Amended Answer, Counterclaim, and Third-Party Complaint)]. Elk Valley filed a motion to  
21 dismiss the counterclaim, which was granted by the Honorable Kenneth Cory by order, dated  
22 February 28, 2009. This action was removed to United States District Court for the District of  
23 Nevada by Third-Party Defendant, on April 3, 2009. [Docket #1].

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25  
26  
27 <sup>1</sup> The Promissory Notes were dated November 8, 2006, December 14, 2006, and February 28,  
2007, respectively.

28 <sup>2</sup> The first and second Promissory Notes matured, and were due and payable on January 1,  
2008. The third Promissory Note matured, and was due and payable on March 1, 2008.

1 Elk Valley's Motion for Partial Summary Judgment is based on Defendants' undisputed  
2 failure to repay the loans made pursuant to the Promissory Notes, and breach of Defendant Ellis'  
3 contractual unconditional guarantee to repay the loans.

4 To date, notwithstanding demands for payment, the loans have not been repaid. The  
5 Defendants have breached the terms of the Promissory Notes, including the unconditional  
6 Guaranty Agreement by Defendant Ellis to repay the loans. Having performed its part of the  
7 terms and provisions of the Promissory Notes, and there being no genuine issues of material fact,  
8 Elk Valley is entitled to judgment on its contractual claims, as a matter of law.

## 9 II. APPLICABLE LAW

### 10 The Standard for Motions for Partial Summary Judgment

11 Summary judgment allows courts to avoid unnecessary trials where no material factual  
12 dispute exists. *Nw. Motorcycle Ass'n v. U.S. Dep't. of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994).  
13 The court must view the evidence and the inferences arising there from "in the light most favor-  
14 able to the nonmoving party," *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996), and should  
15 award summary judgment where no genuine issues of material fact remain in dispute and the  
16 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

17 Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary  
18 basis for a reasonable jury to find for the nonmoving party. Fed. R. Civ. P. 50(a). The moving  
19 party bears the burden of informing the court of the basis for its motion, together with evidence  
20 demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477  
21 U.S. 317, 323 (1986).

22 Once the moving party has met its burden, the party opposing the motion may not rest  
23 upon mere allegations or denials in the pleadings, but must set forth specific facts showing that  
24 there exists a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).  
25 Although the parties may submit evidence in an inadmissible form—namely, depositions,  
26 admissions, interrogatory answers, and affidavits—only evidence which might be admissible at  
27 trial may be considered by a trial court in ruling on a summary judgment motion. Fed. R. Civ. P.  
28 56(c); *Beyene v. Coleman Security Services, Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must: (1) determine whether a fact is material; (2) determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; (3) consider that evidence in light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248.

Summary judgment is proper if no material factual issues exist for trial. *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999). "As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputes over irrelevant or unnecessary facts should not be considered. *Id.* Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. *Id.*

### III. CONCISE STATEMENT OF UNDISPUTED MATERIAL FACTS

Pursuant to Local Rule 56-1, Plaintiff herein provides a Concise Statement of Undisputed Material Facts in Support of Plaintiff's Motion for Summary Judgment.

<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
1. Elk Valley is a federally recognized Indian tribe.	Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 1)
2. In November, 2006, Defendant Ellis asked Elk Valley if Elk Valley would be interested in making a business investment.	Hardy Dec., Ex. 2, ¶ 8 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)
3. Defendants Ellis Partners, LLC and Ellis discussed a loan arrangement and equity interest in Defendant Ellis Partners, LLC, with Elk Valley.	Hardy Dec., Ex. 2, ¶¶ 9 and 10 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
4. On November 8, 2006, Elk Valley and Defendant Ellis Partners, LLC, entered into a promissory note in the amount of \$250,000.00. ("Promissory Note I")	Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)  Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 9)  Hardy Dec., Ex. 4 (Miller Dec. ¶ 3)
5. Defendant Ellis personally guaranteed the repayment of Promissory Note I, which provides that "In consideration of the loan evidenced by the within note made at the request of the undersigned, on the terms and conditions of the note, the undersigned guarantees the prompt payment of the note and each installment when due, whether at stated maturity, acceleration, or otherwise, and in accordance with all terms and conditions of the note, and agrees to all terms and conditions and affirms the waivers and consents contained in the note. The liability of the undersigned under this guaranty shall be direct and not conditional or contingent on the pursuit of any remedies against any maker or endorser, or against any collateral held as security for the payment of the note."	Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)  Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)  Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 11)  Hardy Dec., Ex. 4 (Miller Dec. ¶ 9)
6. Ellis received the loan proceeds (\$250,000.00) from Promissory Note I, dated November 8, 2006.	Hardy Dec., Ex. 3 (Defendants' Responses to Elk Valley's Request for Admission Nos. 13 and 131)
7. Defendant Ellis subsequently inquired if Elk Valley would be interested in another business investment.	Hardy Dec., Ex. 2, ¶ 8 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)
8. On December 14, 2006, Defendant Ellis Partners, LLC, entered into a second Promissory Note in the amount of \$115,000.00. ("Promissory Note II")	Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)  Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 18)  Hardy Dec., Ex. 4 (Miller Dec. ¶ 4)

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
<p>9. Defendant Ellis personally guaranteed the repayment of Promissory Note II, which provides that "In consideration of the loan evidenced by the within note made at the request of the undersigned, on the terms and conditions of the note, the undersigned guarantees the prompt payment of the note and each installment when due, whether at stated maturity, acceleration, or otherwise, and in accordance with all terms and conditions of the note, and agrees to all terms and conditions and affirms the waivers and consents contained in the note. The liability of the undersigned under this guaranty shall be direct and not conditional or contingent on the pursuit of any remedies against any maker or endorser, or against any collateral held as security for the payment of the note."</p>	<p>Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)</p> <p>Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)</p> <p>Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 20)</p> <p>Hardy Dec., Ex. 4 (Miller Dec. ¶ 9)</p>
<p>10. Ellis received the loan proceeds (\$115,000.00) from Promissory Note II, dated December 14, 2006.</p>	<p>Hardy Dec., Ex. 3 (Defendants' Responses to Elk Valley's Request for Admission Nos. 22 and 131)</p>
<p>11. On February 28, 2007, Defendant Ellis Partners, LLC entered into a third Promissory Note in the amount of \$115,000.00. ("Promissory Note III")</p>	<p>Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)</p> <p>Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 28)</p> <p>Hardy Dec., Ex. 4 (Miller Dec. ¶ 5)</p>
<p>12. Defendant Ellis personally guaranteed the repayment of Promissory Note III, which provides that "In consideration of the loan evidenced by the within note made at the request of the undersigned, on the terms and conditions of the note, the undersigned guarantees the prompt payment of the note and each installment when due, whether at stated maturity, acceleration, or otherwise, and in accordance with all terms and conditions of the note, and agrees to all</p>	<p>Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)</p> <p>Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)</p> <p>Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 30)</p> <p>Hardy Dec., Ex. 4 (Miller Dec. ¶ 9)</p>



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<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
terms and conditions and affirms the waivers and consents contained in the note. The liability of the undersigned under this guaranty shall be direct and not conditional or contingent on the pursuit of any remedies against any maker or endorser, or against any collateral held as security for the payment of the note.”	
13. Ellis received the loan proceeds (\$115,000.00) from Promissory Note III, dated February 28, 2007.	Hardy Dec., Ex. 3 (Defendants’ Responses to Elk Valley’s Request for Admission Nos. 32 and 131)
14. The Promissory Notes and associated guaranties constitute valid written contracts between Elk Valley and Ellis.	Hardy Dec., Ex. 3 (Defendants’ Response to Elk Valley’s Request for Admission No. 101)
16. Pursuant to terms of Promissory Notes I-III, Defendants owed Elk Valley a duty of good faith to abide by the terms, both expressed and implied.	Hardy Dec., Ex. 3 (Defendants’ Response to Elk Valley’s Request for Admission No. 135)
17. Elk Valley could justifiably expect that Defendants would perform in good faith under the terms of Promissory Notes I-III.	Hardy Dec., Ex. 3 (Defendants’ Response to Elk Valley’s Request for Admission No. 138)
18. Elk Valley and Defendants voluntarily entered into the Promissory Notes I-III constituting contracts obligating Defendants to repay the full amount of the loans plus interest.	Hardy Dec., Ex. 2, ¶ 34 (Defendants’ Amended Answer, Counterclaim and Third-Party Complaint)
19. A covenant of good faith and fair dealing was implied into the Promissory Notes I-III entered into by Elk Valley and Defendants.	Hardy Dec., Ex. 2, ¶ 49 (Defendants’ Amended Answer, Counterclaim and Third-Party Complaint)  Hardy Dec., Ex. 3 (Defendants’ Response to Elk Valley’s Request for Admission No. 134)
20. Promissory Note II provided that a 1% equity interest in Ellis Partners, LLC was valued at \$125,000.00.	Hardy Dec., Ex. 2, ¶ 12 (Defendants’ Amended Answer, Counterclaim and Third-Party Complaint)  Hardy Dec., Ex. 3 (Defendants’ Response to Elk Valley’s Request for Admission No. 24)

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<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
21. Promissory Note III provided that a 1% equity interest in Ellis Partners, LLC was valued at \$200,000.00.	Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)
22. As set forth by Section 1 of Promissory Notes I, II, and III, Elk Valley's total percentage of equity interest in Ellis Partners, LLC was set at 4%.	Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 6)
23. Pursuant to Section 1 of the Promissory Notes I-III, if Elk Valley was approved by the NIGC to become a member of Ellis Partners, LLC, either Elk Valley or Ellis Partners, LLC shall have the right at any time prior to maturity at their option to convert (subject to satisfaction of various conditions) the principal amount of the Promissory Notes I-III into fully paid and non-assessable membership interest in Ellis Partners, LLC.	Hardy Dec., Exs. A, B, and C (Promissory Notes I-III) attached to Ex. 1
24. NIGC approval was a condition precedent to the conversion of the Promissory Notes from debt to equity.	Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 60)
25. As set forth in Section 2 of Promissory Note I, the note matured and was due and payable on January 1, 2008.	Hardy Dec., Ex. A (Promissory Note I) attached to Ex. 1 Hardy Dec., Ex. 4 (Miller Dec. ¶ 6)
26. As set forth in Section 2 of Promissory Note II, the note matured and was due and payable on January 1, 2008.	Hardy Dec., Ex. B (Promissory Note I) attached to Ex. 1 Hardy Dec., Ex. 4 (Miller Dec. ¶ 7)
27. As set forth in Section 2 of Promissory Note III, the note matured and was due and payable on March 1, 2008.	Hardy Dec., Ex. C (Promissory Note I) attached to Ex. 1 Hardy Dec., Ex. 4 (Miller Dec. ¶ 8)
28. As set forth in Section 10 of Promissory Notes I-III, the Borrower and/or Guarantor is required to pay the	Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)



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<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
attorneys' fees, court costs, and all other expenses of the prevailing party, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled.	
29. On June 10, 2008, Elk Valley demanded, in writing, from Defendants repayment of the loans pursuant to Promissory Notes I, II, and III.	Hardy Dec., Ex. 3 (Defendants' Responses to Elk Valley's Request for Admissions No. 75 and No. 76)  Hardy Dec., Ex. D (letters dated June 10, 2008) attached to Ex. 1
30. Ellis has not paid any of the monies due and owing to Elk Valley pursuant to the terms of Promissory Note I, dated November 8, 2006.	Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 16)
31. Ellis has not paid any of the monies due and owing to Elk Valley pursuant to the terms of Promissory Note II, dated December 14, 2006.	Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 26)
32. Ellis has not paid any of the monies due and owing to Elk Valley pursuant to the terms of Promissory Note III, dated February 28, 2007.	Hardy Dec., Ex. 3 (Defendants' Response to Elk Valley's Request for Admission No. 36)
33. Neither Elk Valley nor Defendants obtained NIGC approval for Elk Valley to become a member of Ellis Partners, LLC (or any other entity).	Hardy Dec., Ex. 4 (Miller Dec. ¶¶ 11 and 19)
34. Defendants did not provide an amended operating agreement in a form satisfactory to the NIGC for execution by Elk Valley.	Hardy Dec., Ex. 4 (Miller Dec. ¶ 16)
35. The Promissory Notes, individually and collectively, were not marked "paid in full".	Hardy Dec., Exs. A, B, and "C" (Promissory Notes I-III) attached to Ex. 1  Hardy Dec., Ex. 4 (Miller Dec. ¶¶ 13, 14, and 15)
36. NIGC did not approve the form of the amended operating agreement for Elk Valley to join Ellis Partners, LLC (or any other entity) as a member.	Hardy Dec., Ex. 4 (Miller Dec. ¶ 18)

<u>UNDISPUTED MATERIAL FACTS</u>	<u>SUPPORTING EVIDENCE</u>
37. Defendants did not provide to Elk Valley a copy of the Articles of Incorporation or the By-Laws of Ellis Partners, Inc.	Hardy Dec., Ex. 4 (Miller Dec. ¶ 20)
38. Elk Valley did not execute any conversion agreement for conversion of the loans (including principal and interest) evidenced by Promissory Notes I-III into a membership interest in Ellis Partners, LLC or shares of Ellis Partners, Inc.	Hardy Dec., Ex. 4 (Miller Dec. ¶ 21)

#### IV. LEGAL ARGUMENTS

##### **Elk Valley is Entitled to Judgment as a Matter of Law as There Are No Genuine Issues of Material Fact Regarding Defendants' Breach of Contract and Guaranty Agreement**

Elk Valley's Motion for Partial Summary Judgment is based on Defendants' failure to repay the loans made pursuant to the Promissory Notes, and Defendant Ellis' breach of contractual personal guarantees for repayment of the loans. There are no genuine issues of material fact in dispute concerning Elk Valley's causes of action arising out of Defendants' breach of the Promissory Notes, and Defendant Ellis' unconditional Guaranty Agreement. Therefore, Elk Valley is entitled to judgment on its breach of contract claims, as a matter of law.

##### **A. The Promissory Notes and the Guaranty Agreement are Valid, Unambiguous, and Enforceable, as a Matter Of Law**

Elk Valley is a federally recognized Indian tribe.<sup>3</sup> In November 2006, Defendant Ellis asked if Plaintiff would be interested in making a business investment.<sup>4</sup> Elk Valley discussed a loan arrangement and equity interest in Defendant Ellis Partners, LLC, with Defendants Ellis, and Ellis Partners, LLC.<sup>5</sup>

<sup>3</sup> Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 1)

<sup>4</sup> Hardy Dec., Ex. 2, ¶ 8 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)

<sup>5</sup> Hardy Dec., Ex. 2, ¶¶ 9 and 10 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)

On November 8, 2006, Elk Valley and Defendants Ellis Partners, LLC, entered into a promissory note in the amount of \$250,000.00. ("Promissory Note I")<sup>6</sup>. Defendant Ellis has admitted that he received the loan proceeds from Promissory Note I (\$250,000.00).<sup>7</sup>

Defendant Ellis subsequently asked if Elk Valley would be interested in another business investment.<sup>8</sup> On December 14, 2006, Elk Valley and Defendant Ellis Partners, LLC, entered into a second Promissory Note in the amount of \$115,000.00. ("Promissory Note II")<sup>9</sup>.

Defendant Ellis has admitted that he received the loan proceeds from Promissory Note II.<sup>10</sup>

On February 28, 2007, Elk Valley and Defendant Ellis Partners, LLC, entered into a third Promissory Note in the amount of \$115,000.00. ("Promissory Note III")<sup>11</sup>. Defendant Ellis has admitted that he also received the loan proceeds from Promissory Note III (\$115,000.00).<sup>12</sup>

Contemporaneously with the execution of Promissory Notes I, II, and III, Defendant Ellis executed an individual, personal guaranty, in favor of Plaintiff for each of the Promissory Notes.<sup>13</sup> The Guaranty Agreement contained in the Promissory Notes expressly provides:

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<sup>6</sup> Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint); Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 9)

<sup>7</sup> Hardy Dec., Ex. 3 (Defendants' Responses to Plaintiff's Request for Admission Nos. 13 and 131)

<sup>8</sup> Hardy Dec., Ex. 2, ¶ 8 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)

<sup>9</sup> Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint); Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 18)

<sup>10</sup> Hardy Dec., Ex. 3 (Defendants' Responses to Plaintiff's Request for Admission Nos. 22 and 131)

<sup>11</sup> Hardy Dec., Ex. 2, ¶ 12 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint); Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 28)

<sup>12</sup> Hardy Dec., Ex. 3 (Defendants' Responses to Plaintiff's Request for Admission Nos. 32 and 131)

<sup>13</sup> Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint); Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 11); Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 20); Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 30)

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In consideration of the loan evidenced by the within note made at the request of the undersigned, on the terms and conditions of the note, the undersigned guarantees the prompt payment of the note and each installment when due, whether at stated maturity, acceleration, or otherwise, and in accordance with all terms and conditions of the note, and agrees to all terms and conditions and affirms the waivers and consents contained in the note. The liability of the undersigned under this guaranty shall be direct and not conditional or contingent on the pursuit of any remedies against any maker or endorser, or against any collateral held as security for the payment of the note.<sup>14</sup>

Section 10 of Promissory Notes I-III, further provides that the Borrower (Ellis Partners, LLC) and/or Guarantor (Ellis) is required to pay the attorneys' fees, court costs, and all other expenses of the prevailing party, whether or not taxable by the court as costs, in addition to any other relief to which the prevailing party may be entitled.<sup>15</sup>

As set forth in Section 2 of the Promissory Notes, Promissory Note I matured and was due and payable on January 1, 2008.<sup>16</sup> Similarly, Promissory Note II matured, and was due and payable on January 1, 2008.<sup>17</sup> Promissory Note III matured, and was due and payable on March 1, 2008.<sup>18</sup>

On June 10, 2008, Elk Valley demanded, in writing, from Defendants repayment of the loans pursuant to Promissory Notes I, II, and III.<sup>19</sup> To date, Ellis has not paid any of the monies due and owing to Elk Valley pursuant to the terms of Promissory Notes I, II, and III.<sup>20</sup>

It is fundamental contract law that a document that is "clear on its face will be construed from the written language and enforced as written". *Crockett & Myers, Ltd. v. Napier, Fitzgerald*

<sup>14</sup> Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)

<sup>15</sup> Hardy Dec., Ex. 2, ¶ 30 (Defendants' Amended Answer, Counterclaim and Third-Party Complaint)

<sup>16</sup> Hardy Dec., Ex. A (Promissory Note I) attached to Ex. 1

<sup>17</sup> Hardy Dec., Ex. B (Promissory Note II) attached to Ex. 1

<sup>18</sup> Hardy Dec., Ex. C (Promissory Note III) attached to Ex. 1

<sup>19</sup> Hardy Dec., Ex. 3 (Defendants' Responses to Plaintiff's Request for Admissions No. 75 and No. 76); Hardy Dec., Ex. D (letters dated June 10, 2008) attached to Ex. 1

<sup>20</sup> Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission Nos. 16, 26, and 36)

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1 & Kirby, LLP, 440 F. Supp. 2d 1184 (D. Nev. 2006), citing to *Sandy Valley Assocs. v. Sky Ranch*  
2 *Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001) (citing *Ellison v. C.S.A.A.*, 106 Nev.  
3 601, 797 P.2d 975 (1990)). A contract can not be reformed except for mutual mistake in  
4 wording or fraud by opposite party. *Dodge Bros., Inc. v. Williams Estate Co.*, 52 Nev. 364, 287  
5 P. 282 (1930).

6  
7 Moreover, “the interpretation of contract where the facts are not in dispute is a question  
8 of law”. *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 839 P.2d 599 (1992);  
9 *Crockett & Myers, Ltd.*, 440 F. Supp. 2d at 1193 (D. Nev. 2006), citing to *Shelton v. Shelton*, 119  
10 Nev. 492, 78 P.3d 507 (2003). The goal of contract interpretation is to give effect to the parties’  
11 mutual intentions. *Id.*, citing to *Pioneer Title Ins. & Trust Co. v. Cantrell*, 71 Nev. 243, 286 P.2d  
12 261 (1955) (quoting *Caruso v. John Hancock Mut. Life Ins. Co.*, 136 N.J.L. 597, 57 A.2d 359  
13 (1948) (“The law will not make a better contract for the parties than they themselves have seen  
14 fit to enter into...”)).

15  
16 In the instant action, (1) there are no genuine issues of material fact concerning the  
17 validity of the Promissory Notes or the unconditional Guaranty Agreement, and (2) Defendants  
18 have never alleged mutual mistake in wording of the agreements, or fraud by Elk Valley.<sup>21</sup>

19  
20 It is undisputed that Promissory Notes I-III, as well as the Guaranty Agreements  
21 contained in the Promissory Notes are valid, complete, and unambiguous. Defendants have  
22 unequivocally admitted that: (1) the Promissory Notes and the Guaranty Agreements are valid  
23 written contracts between Elk Valley and Ellis;<sup>22</sup> (2) Elk Valley and Defendants voluntarily  
24 entered into the Promissory Notes I-III constituting contracts obligating Defendants to repay the  
25 full amount of the loans plus interest;<sup>23</sup> (3) pursuant to terms of Promissory Notes I-III,

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27  
28 <sup>21</sup> Hardy Dec., Ex. 2 (Defendants’ Amended Answer, Counterclaim and Third-Party Complaint)

<sup>22</sup> Hardy Dec., Ex. 3 (Defendants’ Response to Plaintiff’s Request for Admission No. 101)

<sup>23</sup> Hardy Dec., Ex. 2, ¶ 34 (Defendants’ Amended Answer, Counterclaim and Third-Party Complaint)

1 Defendants owed Plaintiff a duty of good faith to abide by the terms, both expressed and  
 2 implied;<sup>24</sup>, and (4) Elk Valley could justifiably expect that Defendants would perform in good  
 3 faith under the terms of Promissory Notes I-III.<sup>25</sup>

4 The Promissory Notes have matured, and notwithstanding Elk Valley's demand for  
 5 payment, Defendants have not paid any of the monies due and owing to Elk Valley pursuant to  
 6 the terms of Promissory Notes.

7 Having performed its part of the terms and provisions of the Promissory Notes, and there  
 8 being no genuine issues of material fact concerning the validity of the Promissory Notes, and the  
 9 unconditional Guaranty Agreement contained therein, Elk Valley is entitled to judgment on it  
 10 contractual claims, plus interest and attorney's fees.  
 11

12  
 13 **B. Elk Valley Elected to Not Exercise its Option to Convert the Loans to an**  
 14 **Equity Interest in Ellis Partners, LLC, as the Required Conditions Precedent Were not Met**

15 Notwithstanding Defendants' admission that the Promissory Notes, and the unconditional  
 16 Guaranty Agreements contained therein, are valid, unambiguous, and enforceable, they dispute  
 17 any sums are now due and owing on the Promissory Notes because Defendants contend that Elk  
 18 Valley elected to convert the loans to an equity interest in Ellis Partners, LLC pursuant to  
 19 Section 1 of the Promissory Notes. Nothing could be further from the truth.  
 20

21 Section 1 of the Promissory Note I provides:

22 Subject to the terms and provisions of this paragraph, if  
 23 Lender or the members of Lender are approved by the  
 24 NIGC to become members of Borrower, **either Lender**  
 25 **[Elk Valley] or Borrower [Ellis Partners, LLC] shall**  
 26 **have the right at any time prior to maturity, at their**  
 27 **option, to convert the principal amount of this Note into**  
**fully paid and non-assessable membership interests in**  
**Borrower, at the conversion rate of two percent (2%) of**

28 <sup>24</sup> Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 135)

<sup>25</sup> Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 138)



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the membership interest in Borrower for the \$250,000 principal amount of this Note.

After NIGC approval, Lender or Borrower or their members will give each other written notice that they are converting this Note into membership interest in the Borrower specifying the name or names (with address) in which the membership interests are to be issued.

**Upon surrender of the Note to the Borrower, as a condition precedent to becoming a member of Borrower, Lender or its members must execute and agree to be bound by an amended operating agreement of the Borrower in a form satisfactory to the NIGC, the Borrower, and its existing members.** When the Note or any portion thereof is delivered to the Borrower for conversion, it shall be marked Paid in Full and shall be of no further force or effect.

**If Lender applies for and does not receive NIGC approval, Lender shall not be entitled to any membership interest in the Borrower. If Lender is not approved by the NIGC, this Note shall be repaid pursuant to its terms.**

**As promptly as practical after the surrender of the Note for conversion, the Borrower shall deliver an Amended Operating Agreement for the Borrower to Lender for execution. The conversion shall be deemed to have been made immediately prior to the close of business on the date that the Amended Operating Agreement is executed by Lender** so that the rights of the holder of the Note (or the portion being converted) shall cease, and the person(s) or entities entitled to receive the membership interests shall be treated for all purposes as having become the record holder or holders of such membership interest at that time.<sup>26</sup> (Emphasis added).

<sup>26</sup> Hardy Dec., Exs. A, B, and C (Promissory notes I-III) attached to Ex. 1.

**Promissory Note II**, Section 1, provides that either Lender or Borrower shall have the right at any time prior to maturity, at their option, to convert the principal amount of this Note into fully paid and non-assessable membership interests in Borrower, at the conversion rate of **one percent (1%)** of the membership interest in Borrower for the **\$115,000** principal amount of this Note. Borrower hereby acknowledges and agrees that the value of 1% membership interest in Borrower is **\$125,000**.

**Promissory Note III**, Section 1, provides that either Lender or Borrower shall have the right at any time prior to maturity, at their option, to convert the principal amount of this Note into fully

Section 2 of Promissory Note I provides:

**If Lender does not convert this note to membership interests in the Borrower, the unpaid principal balance hereof, together with all unpaid interest accrued thereon, and all other amounts payable by Borrower hereunder shall be due and payable on March 1, 2008 (the "Maturity Date").<sup>27</sup>** (emphasis added)

The Promissory Notes do not require Elk Valley to convert the principal amount of this Note into fully paid and non-assessable membership interests in Borrower. Section 1 of the Promissory Notes merely specifies that in the event either the Lender (Elk Valley) or the Borrower (Ellis Partners, LLC), at their option, elects to convert the amount of the loan to an equity interest in the Borrower, the following conditions precedent are required to be satisfied prior to satisfaction of conversion to an equity interest:

- 1) National Indian Gaming Commission ("NIGC") approval of Plaintiff's membership in Borrower;
- 2) After NIGC approval, Plaintiff or Borrower will give written notice that they are converting the Note into a membership interest in the Borrower;
- 3) Upon surrender of the Note following satisfaction of conditions 1 and 2, above, Plaintiff's execution of and agreement to be bound by an amended operating agreement of the Borrower in a form satisfactory to the NIGC, Borrower, and Borrower's members;
- 4) Delivery of the Note to Borrower and marking of it as "paid in full"; and
- 5) Delivery by Borrower of an amended operating agreement to Lender for execution.

paid and non-assessable membership interests in Borrower, at the conversion rate of **one percent (1%)** of the membership interest in Borrower for the **\$115,000** principal amount of this Note. Borrower hereby acknowledges and agrees that the value of 1% membership interest in Borrower is **\$200,000**.

<sup>27</sup> Hardy Dec., Exs. A, B, and C (Promissory notes I-III) attached to Ex. 1. The Maturity Date of **Promissory Note II** is January 1, 2008; The Maturity Date of Promissory Note III is March 1, 2008.

Defendants concede that NIGC approval was a condition precedent to the conversion of the notes from debt to equity.<sup>28</sup> None of the five conditions precedent to conversion were satisfied.<sup>29</sup> Hence, no plausible argument in favor of conversion exists.

Furthermore, the Promissory Notes expressly contemplate that conversion might not be sought or might be unsuccessful for failure to satisfy the conditions precedent. Specifically, Section 1 of the Promissory Notes provide that “[i]f Lender [Elk Valley] applies for and does not receive NIGC approval, Lender shall not be entitled to any membership interest in the Borrower. If Lender is not approved by the NIGC, this Note shall be repaid pursuant to its terms.”<sup>30</sup> (Emphasis added). In addition, Section 2 of the Promissory Notes expressly addresses the failure of conversion and provides: “[i]f Lender does not convert this note to membership interests in the Borrower, the unpaid principal balance hereof, together with all unpaid interest accrued thereon, and all other amounts payable by Borrower hereunder shall be due and payable on January 1, 2008 (the “Maturity Date”).”<sup>31</sup>

Defendants do not dispute the amount of the loans or that the indebtedness is due and owing if the loans were not converted into equity interests in Borrower. Defendants’ pleadings raise one issue – whether Elk Valley elected to convert the indebtedness to equity in Borrower.

It is undisputed that Elk Valley wrote a letter describing its desire to convert the indebtedness to equity. However, Elk Valley’s inquiry is immaterial and summary judgment is appropriate because only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. Factual disputes that are

<sup>28</sup> Hardy Dec., Ex. 3 (Defendants’ Response to Plaintiff’s Request for Admission No. 60)

<sup>29</sup> Hardy Dec., Ex. 4 (Miller Dec. ¶¶ 11-21); Hardy Dec., Exs. A, B, and “C” (Promissory Notes I-III) attached to Ex. 1

<sup>30</sup> Hardy Dec., Exs. A, B, and C (Promissory notes I-III) attached to Ex. 1

<sup>31</sup> Hardy Dec., Exs. A, B, and C (Promissory notes I-III) attached to Ex. 1. The Maturity Date of Promissory Note II is January 1, 2008; The Maturity Date of Promissory Note III is March 1, 2008.

1 irrelevant or unnecessary will not preclude summary judgment. *See e.g., Anderson v. Liberty*  
2 *Lobby, Inc.*, 477 U.S. 242 (1986). This matter can be addressed purely as a matter of contract  
3 interpretation.

4 Defendants refuse to pay Elk Valley the amount due on the Promissory Notes solely on  
5 the ground that Elk Valley expressed a desire to convert the indebtedness to an equity interest in  
6 Borrower. That defense, even if true, is immaterial and cannot defeat summary judgment. Even  
7 written notice of Elk Valley's desire to convert to equity the indebtedness would merely trigger  
8 the need to satisfy the five (5) conditions precedent to actual conversion. However, none of the  
9 five (5) conditions precedent were satisfied. Hence, as a matter of law, conversion of the loan to  
10 an equity interest under the express terms of the contract did not occur.  
11

12 There is no dispute that the conditions precedent to conversion did not occur. As detailed  
13 previously, the construction of a contract and whether a contract is ambiguous is a legal question.  
14 *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 440 F. Supp. 2d 1184, 1193 (D.  
15 Nev. 2006); *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 839 P.2d 599 (1992).  
16

17 Additionally, the parole evidence rule does not permit the admission of extrinsic evidence  
18 to change the contract terms, when the terms of a written agreement are clear, definite, and  
19 unambiguous. *Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032 (2004).  
20

21 Defendants have unequivocally admitted that the Promissory Notes and the Guaranty  
22 Agreements are valid contracts between Elk Valley and Ellis.<sup>32</sup> There is no dispute that the loans  
23  
24  
25  
26  
27  
28

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<sup>32</sup> Hardy Dec., Ex. 3 (Defendants' Response to Plaintiff's Request for Admission No. 101)

1 were made to Ellis Partners, LLC,<sup>33</sup> or that Defendant Ellis unconditionally guaranteed the  
2 repayment of the loans.<sup>34</sup>

3 Section 1 of the Promissory Notes unambiguously states the five conditions precedent to  
4 election by either party to convert the loans to an equity interest.<sup>35</sup> The conditions precedent  
5 were not satisfied; therefore, no conversion could have possibly occurred. *See, Sala & Ruthe*  
6 *Realty, Inc. v. Campbell*, 89 Nev. 483, 515 P.2d 394 (1973) (the buyer's approval of an inventory  
7 and accounting of the motel books, was a condition precedent to the existence of the contract.  
8 His promise to purchase was therefore illusory because he was not obligated to perform), citing 1  
9 *Corbin on Contracts* § 16 (1950).  
10

11 Furthermore, "when a contractual duty is subject to a condition precedent . . . there is no  
12 duty of immediate performance and there can be no breach of that contractual duty by mere  
13 nonperformance, unless the condition precedent is either performed or excused. If such a  
14 condition precedent is neither performed or excused within the time that is required, such failure  
15 now makes it impossible for a breach of contract to occur." *Mann v. Glens Falls Insurance*  
16 *Company*, 418 F. Supp. 237 (D. Nev. 1974), quoting 6 *Corbin on Contracts* § 1252, p. 2 (2d Ed.  
17 1962).  
18

19 In the instant action, there is no ambiguity regarding the amounts due and owing under  
20 the terms of the Promissory Notes, the Guaranty Agreements. There is also no dispute that none  
21 of the five conditions precedent to conversion were satisfied. There being no genuine issues of  
22 material fact concerning the validity of the Promissory Notes and the Guaranty Agreements, Elk  
23 Valley is entitled to judgment on its contractual claims, plus attorneys' fees and interest.  
24  
25

26 <sup>33</sup> Hardy Dec., Ex. 3 (Defendants' Responses to Plaintiff's Request for Admission Nos. 13, 22,  
27 32, and 131)

28 <sup>34</sup> Hardy Dec., Ex. 2, ¶¶ 12 and 30 (Defendants' Amended Answer, Counterclaim and Third-  
Party Complaint)

<sup>35</sup> Hardy Dec., Exs. A, B, and C (Promissory notes I-III) attached to Ex. 1

1 **V. CONCLUSION**

2 Based upon the foregoing, there are no genuine issues of material fact to prevent an Order  
 3 granting the Elk Valley's Motion for Summary Judgment on its first cause of action for breach of  
 4 contract, and second cause of action for breach of guaranty agreement. There is no dispute that  
 5 the Promissory Notes constitute valid written contracts, Defendant Ellis unconditionally  
 6 guaranteed the payment of the loans, Defendants have received the loan proceeds, the  
 7 Promissory Notes have matured, and Defendants have not paid any of the monies that are due  
 8 and owing to Elk Valley pursuant to the terms of the Promissory Notes and the Guaranty  
 9 Agreements. Accordingly, Elk Valley requests that the Court enter an Order granting judgment  
 10 in favor of Elk Valley's contractual claims.

11 DATED this 24<sup>th</sup> day of November, 2009.

GORDON & REES LLP

13 /s/ Joseph P. Hardy  
 14 Joseph P. Hardy  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am over the age of eighteen years and an employee of Gordon & Rees LLP, and that on the 24<sup>th</sup> day of November, 2009, service of the foregoing PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT by depositing a true copy of the same for mailing, first class mail, postage prepaid, at Las Vegas, Nevada, addressed as follows:

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